SUPREME COURT, U. S.

In the Supreme Court of the United States

October Term, 1970

No. 70-

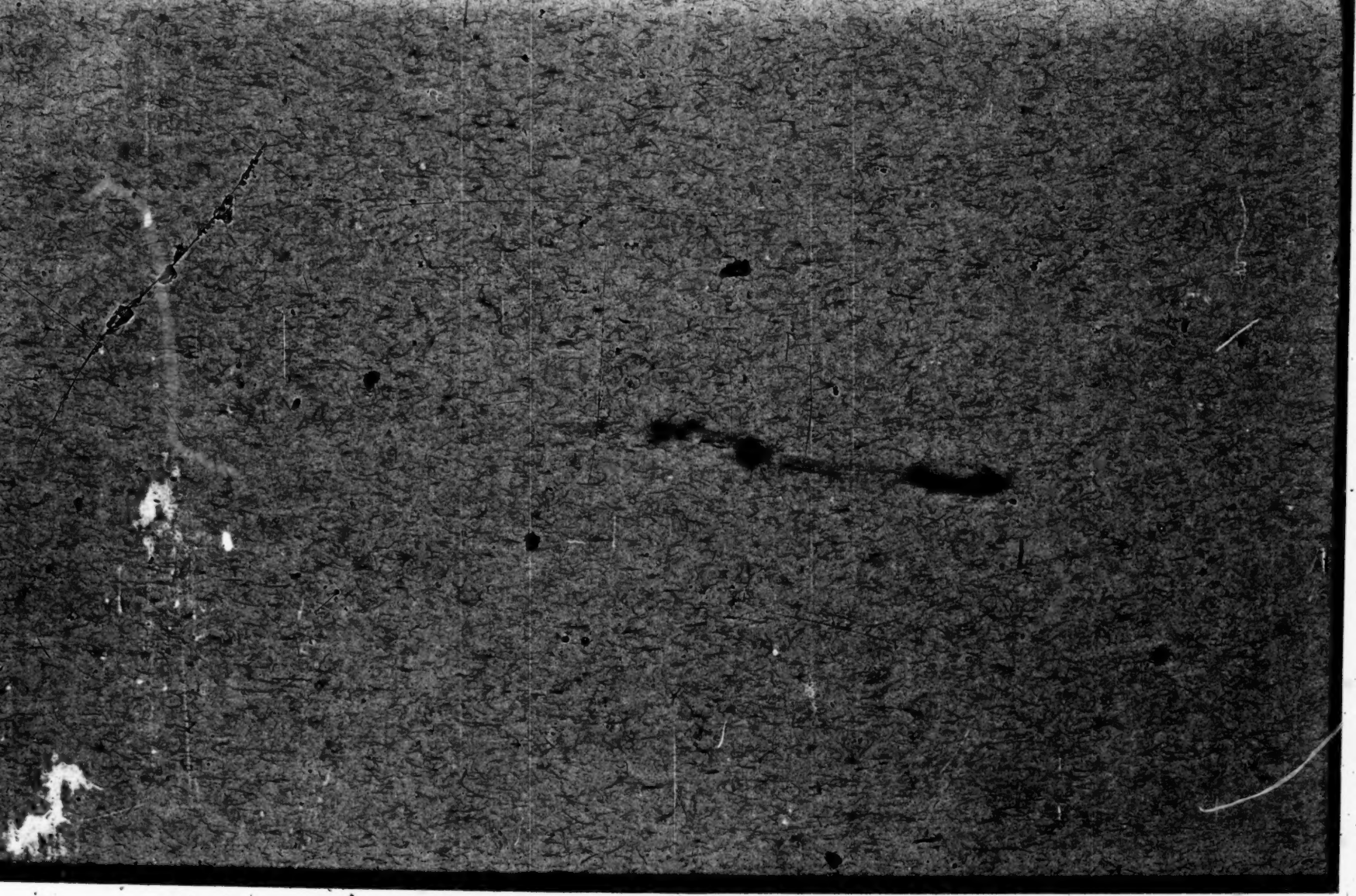
WILLIAM HOWARD SCHWARTZ, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR THE UNITED STATES IN OPPOSITION



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 502

WILLIAM EUGENE SHEEHAN, ROBERT LEE SHEEHAN AND JOSEPH ANDREW SHEEHAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A twenty-count indictment returned in the United States District Court for the Southern District of Iowa charged petitioners and Leroy Junior Westberg with having used the mails in a scheme to defraud customers in the sale of hearing aids in violation of 18 U.S.C. 1341 (App. 2–15).[1] After a jury trial William Sheehan and Robert Sheehan were found guilty on sixteen counts and acquitted on one count.[2] On Novem-

[1] "App." refers to the Appendix in the court of appeals which is on file with this Court.

[2] The trial court withdrew three of the counts before submission to the jury (App. 51, 61–62); Westberg entered a guilty plea prior to trial (App. 63), was sentenced to three years' imprisonment, and did not appeal (Pet. App. 22).

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ber 15, 1968, they were sentenced to five-year concurrent terms of imprisonment and each fined $1,000 (App. 80–82). Joseph Sheehan was found guilty on nine counts, sentenced to concurrent terms of imprisonment for three years, and ordered to pay a $1,000 fine (App. 82–83). On appeal the convictions were affirmed (Pet. App. 21–45).

As the court of appeals pointed out in its comprehensive opinion (see Pet. App. 22, 33), at various times in the consummation of their scheme to sell hearing aids, each petitioner was involved as an owner or employee in one or more of four companies: the Transistor Hearing Aid Company, Central Iowa Hearing Aid Center, Electronic Hearing Aid Company, and Stereophonic Sound Company. (See App. 20, 21, 25, 26–27, 29, 30, 154; Pet. App. 22, 33). On many occasions petitioners either singly, or two at a time, or accompanied by a salesman, called on customers (Pet. App. 34; App. 36–38). In some transactions petitioners sold used, recased hearing aids which they represented as new, and charged exorbitant prices; they promised free service for varying lengths of time extending up to the life of the customer, but did not provide it satisfactorily; they claimed to be representatives of various hearing-aid manufacturers which they did not represent; they repeatedly sold the same person a different hearing aid on the representation that it was a newer model, or was more powerful, or would work better, when actually it did not, usually taking the previous hearing aid as trade and charging an excesive price for the difference (Pet. App. 22–23).

The essence of petitioners' argument is that, although the indictment alleged one common scheme to defraud, the evidence showed multiple, separate schemes. The court below, on whose opinion we basically rely, found otherwise.

The fact that there was a continuing change of names and businesses at different addresses did not alter in any significant manner the fact that petitioners operated together to sell defective hearing aids by means of fraudulent representations. The unitary nature of the scheme was not changed because each petitioner did not participate in each sale. Contrast *Blumenthal* v. *United States*, 332 U.S. 539, 558–559, which is here controlling, with *Kotteakos* v. *United States*, 328 U.S. 750, upon which petitioners improperly rely (Pet. 16). See also *Reistroffer* v. *United States*, 258 F. 2d 379, 393–394 (C.A. 8), certiorari denied, 358 U.S. 927 (unitary mail fraud scheme in sale of vending machines); *Friedman* v. *United States*, 347 F. 2d 697, 708 (C.A. 8), certiorari denied, 382 U.S. 946 (single scheme in operation of dance studios in two different cities).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

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